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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 658

BENJAMIN FRANKLIN COLLINS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.....

BENJAMIN FRANKLIN COLLINS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled cause on December 3, 1959.

Citation to Opinion Below

There was no opinion in the District Court. The opinion of the United States Court of Appeals has not yet been officially reported. It is printed as Appendix A, *infra*, on pages 21 to 26.

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Jurisdiction

The Court of Appeals herein affirmed the conviction of petitioner by judgment dated December 3, 1959. On December 15, 1959 petitioner filed for rehearing which was denied by order dated December 31, 1959. This petition is filed within 30 days thereafter. [1]

The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1) and Rule 37 (c) of the Rules of Criminal Procedure.

Questions Presented

Petitioner was convicted (226a) of perjury, 18 U. S. C. §1621, in two statements made by him under oath before a federal grand jury, (1) that minutes of a labor union meeting held March 11, 1953 had been signed by him as recording secretary *pro tempore* shortly after April 1, 1953 and (2) that minutes of a similar meeting held September 9, 1953 had been so signed on or before October 1, 1953. [2] Falsity thereof was sought to be proved by two witnesses: (a) an employee of IBM (74a) who gave the expert opinion that such minutes had been prepared on a machine using a type design which he had developed himself, that IBM typewriters with such type design were first made available

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[1] The Court of Appeals, however, ordered the mandate stayed and continued petitioner's bail in the sum of $2500 pending petition to this Court for writ of certiorari.

[2] We deem this short narrative of bare-bone facts essential to a clear understanding of the questions presented.

for sale in 1955 and that of his own knowledge there was not in existence prior to February, 1955 any typewriter which could have typed the minutes of 1953; and (b) a document examiner of the FBI (95a) who testified that after making certain comparisons he had reached the conclusion that the 1953 minutes had been typed on an IBM typewriter having the type design aforesaid.[3] From these and further facts to be narrated, the following questions arise:

1. Since the alleged wilful falsity of petitioner's testimony was susceptible of direct proof by living witnesses who were not called by the government,[4] was the testimony given and the expert opinions expressed by the IBM type designer (74a-93a) and the FBI document examiner (95a-100a), sufficient to satisfy the rule of evidence peculiar to perjury cases?[5]

2. With due regard for the legitimate and historical purpose of a grand jury investigation, and in view of the Congressional definition of the offense of perjury, U. S. C., Title 18, §1621, did not petitioner suffer grave injustice (continued in the charge of the trial court):

(a) when the United States attorney, throughout the inquisition of April 24 and May 1 and 2, 1957 before

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[3] The typewriter which he examined had been purchased by the labor union in 1956, and it was produced by petitioner in response to a subpoena duces tecum.

[4] Members of the union and its office personnel.

[5] For the reasons indicated in Supreme Court Rule 19 (1) (b), hereinafter elaborated, we deem this question sufficiently important for the Court to review. The decision of the court below, unless reversed, establishes a new rule of evidence in perjury cases and conflicts with those of other appellate courts.

the grand jury, deprived petitioner of the right to testify that he was not positive but that he believed his sworn testimony to be true (53a-56a); and

(b) when such investigator instructed him (149a) that "Perjury is telling an untruth under oath when you're sworn to tell the truth"?

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Statute Involved

The statute under which petitioner was prosecuted, U. S. C., Title 18, §1621, reads as follows:

> "§1621. Perjury generally—Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, or certificate by him subscribed, is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both."

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Concise Statement of the Case [6]

In the United States District Court for the Southern District of New York, on January 20, 1959, following trial

[6] All references unless otherwise stated are to pages of the appendix printed by petitioner for use of the court of appeals.

to a jury on a 12-count indictment (4a), petitioner was convicted (226a) on the first and second counts (4a, 7a) which charged that on April 24, 1957, before the grand jury for said district, in violation of 18 U. S. C. §1621 defining perjury, defendant (petitioner) unlawfully, wilfully and knowingly gave false testimony to the effect

> (Count 1) that minutes of a meeting of a certain division of a local labor union held at Detroit, Michigan on March 11, 1953 had been signed by defendant as secretary-treasurer shortly after April 1, 1953 (4a-6a); and
>
> (Count 2) that minutes of a similar meeting held at Detroit on September 9, 1953 had likewise been signed by defendant on or before October 1, 1953 (7a-8a).

On February 9, 1959, following denial of motion for new trial (227a-229a), petitioner was sentenced (229a, 231a) to imprisonment for a period of 3 years on each of such counts, service thereon to run concurrently. [1]

Upon date of sentence, petitioner filed notice of appeal (233a-234a) to the United States Court of Appeals for the Second Circuit. On December 3, 1959 the court of appeals affirmed (Appendix A, *infra*, pages 21-26). Within 15 days from the filing of the opinion (Second Circuit Rule 25), a petition for rehearing was filed praying in the alternative for a stay of mandate and continuance of bail pending application to this Court for a writ of certiorari. Rehear-

[1] Bail was fixed at $2500 pending appeal, because the court realized that petitioner had arguable points (230a).

ing was denied December 31, 1959 but the mandate was stayed and bail continued. [8]

At the trial, to prove the alleged falsity of petitioner's grand jury testimony with respect to the dates on which he stated he had signed the minutes, the government relied upon testimony adduced from Clayton P. Smith (74a-93a) and other employees of IBM, a manufacturer of electric typewriters, and from Hilding L. Dahlgren, a special agent of the FBI (95a-100a).

Clayton P. Smith, analyzer of printing methods and equipment for the International Business Machines Corporation, IBM (74a), had for 12 years been employed by that company in designing type to be used in its electric typewriters; he initiated orders for the manufacture of such type, had charge of maintenance and partial responsibility for type production; and while so employed he designed for IBM the "Prestige Pica Type" (75a) which was not made available to salesmen until February of 1955.

His testimony, as summarized by the District Judge (184a) was that, he "was able to give the expert opinion that the minutes of September 9, 1953 and March 11, 1953 were prepared on a typewriter using the Prestige Pica Type design." The trial court also stated (184a-185a) that, since Smith developed this style himself, he "could and did testify from his own knowledge that, except for two prototype typewriters, each of which was under the control at all times of the International Business Machines Company, there was not in existence prior to February,

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[8] Thus, the 30-day period prescribed by Rule 22-(2) for filing this petition for certiorari in a criminal case will expire on January 30, 1960.

1955, any typewriter which could type the minutes of September 9, 1953 and March 11, 1953."

Henry L. Dahlgren, a special agent of the FBI assigned to its laboratories as a full-time document examiner for 16½ years (95a), testified (95a-100a) that, after comparing the minutes in question with an IBM typewriter having Prestige Pica Type design, obtained from the local labor union on subpoena, it was his opinion that the 1953 minutes had been typed thereon. He also testified (99a) that in his work he had made handwriting comparisons, and sometimes ink examinations. His first report to government officials was made on April 7, 1957; later, in October, 1957, the IBM typewriter, produced before the grand jury on subpoena from defendant's office, was sent to the FBI laboratories and Dahlgren then took specimens, examined the same minutes, and made a further report. He testified before the grand jury pertaining to the minutes, in June, 1957, he believed (99a).

It was conceded by defense counsel (94a), and it was the testimony of other witnesses (93a) that, the local labor union in Detroit purchased and paid for this IBM typewriter.

No member of the local union who had attended the Detroit meetings in 1953 was called by the grand jury and questioned "about whether or not the events related in these minutes actually took place" (37a), and no living witness to events which occurred when the minutes were prepared, typed or signed, was called to testify at the trial.

The government contended (112a) that it had by overwhelming proof fulfilled the two-witness or one-witness-plus-corroboration rule applicable to perjury cases. De-

fense counsel, on the other hand, by requests to charge, motions and exceptions,[19] took the position that the testimony of the witness Smith was merely one of the links in a chain of circumstantial evidence (based largely on expert testimony) rather than the direct evidence of a living witness essential to support a perjury charge; and that since the alleged wilful falsity of defendant's testimony respecting the dates on which he had signed the minutes was susceptible of direct proof by living witnesses who were not called by the government, such circumstantial evidence was insufficient.

While the trial court ruled in effect (107a) that the case at bar does not fall within the "document exception" to the general rule in perjury cases, *United States v. Wood*, 14 Pet. (39 U. S.) 430, he instructed the jury (185a, 186a) in substance that the evidence given by the witness Smith (the IBM type designer) is the direct evidence of a living witness necessary to support a perjury conviction under the special rule of law applicable to perjury cases.

The foregoing statement narrates the facts essential to a clear understanding of the first and in our view the more important question presented for review.

The second question presented involves petitioner's claim that the grand jury investigator deprived him of the right to testify that he was not positive as to dates on which he signed the minutes, but that he believed his sworn testimony to be true (53a-56a), and that he gave petitioner an incom-

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[19] Appropriate requests to charge (173a, 174a), exceptions to instructions as given by the District Judge (185a, 186a, 190a), motion to dismiss the indictment at the close of the government's case (100a), motion for a directed verdict of acquittal at the close of the entire case (166a), and motion for new trial (228a).

plete, inadequate and incorrect definition of perjury (149a) which deleted the elements of knowledge and belief of the truth of sworn statements. Since a detailed recital of the facts would overburden this petition,[10] we feel that the following concise statement will suffice to make clear the nature of the question involved:

In his preliminary inquiry (51a-52a) the assistant United States attorney evoked from petitioner detailed information on union office procedure and the time schedule generally followed in preparing and typing minutes on those rare occasions when "once in a while" petitioner temporarily acted in the capacity of recording secretary.

His attention directed to the minutes of March 11, 1953, which bore his signature, petitioner testified (53a) he "believed" he signed them when they were finished, but the investigator, apparently dissatisfied, inquired what the witness meant by "I believe" and whether he had any doubts. Petitioner stated he did not "quite follow" counsel, and, he further testified:

> "When the girl finished them, more than likely I signed them right then."

The following excerpt is from that portion of Collins' testimony on which perjury is predicated in Count 1 of the indictment (4a-6a; 53a-55a) and which immediately follows the above:

> "Q. Is it your recollection that you signed these minutes of March 11, 1953 at or about or shortly after March 11, 1953? A. Yes, sir; I believe so.

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[10] Nor do we intend to argue the question at great length though we reserve the right to present it fully in event that certiorari is granted.

"Q. Is that your sworn testimony, Mr. Collins A. I believe so, yes.

"Q. Not you believe. Is that your sworn testimony, that you signed these minutes of March 11, 1953 either March 11th, the 12th or the 13th or thereabouts? A. Shortly thereafter, yes, sir. I believe so.

"Q. Pardon? A. Yes, sir.

"Q. Are you sure you did not sign these minutes of March 11, 1953 in the year 1954? A. No, sir, I did not sign them in 1954.

"Q. Are you sure of them? A. Why, certainly.

"Q. Are you sure you signed them before 1954? A. I believe that I signed them in the month of March, 1953.

"Q. Are you positive that you did not sign these minutes of March 11, 1953 in the year of 1954 or later? A. Yes, sir; I am positive I did not sign them in 1954" (53a-54a).

Further testimony of defendant regarding the time of signing the minutes of March 11, 1953, (54a, 55a), and testimony forming the basis of Count 2 (7a) in respect of the date on which petitioner signed the minutes of September 9, 1953, were also read into the record of trial (55a, 56a), and exhibit the same line of interrogation.

It should be noted that on March 21, 1957, when defendant was first called before the Grand Jury, after he had produced the records scheduled in the subpoena duces tecum, the following transpired (149a):

"Q. Have you ever heard of perjury? A. Yes, I don't know what it is.

"Q. Perjury is telling an untruth under oath when you're sworn to tell the truth. Do you understand this? A. Yes.

"Q. Perjury is a serious offense. I'm not charging you with that. I just want you to understand because you're the one who said you're here and you're telling the sworn truth. A. I don't intend to tell an untruth, sir."

The question here presented was raised in the trial court by supplemental requests to charge (175a-176a) which were refused (199a-200a) except as charged in the general instructions. They read as follows:

"A. I ask your Honor to charge the jury that the definition of perjury given by the assistant U. S. attorney before the grand jury * * * is incorrect and should not be relied upon by them in determining the issues in this case (175a).

"The definition is as follows (149a) * * *:

"'Perjury is telling an untruth when you're sworn to tell the truth. Do you understand this * * *'

"It fails to state the elements of 'knowledge and criminal intent'."

"C. I ask your Honor to charge the jury that Collins was entitled to testify before the grand jury that he was not positive. He was entitled to have mental reservations about his memory (176a)."

"D. No one had the right to compel Collins to be positive or withdraw his mental reservations (176a)."

The Court of Appeals in reviewing this question (opinion p. 226) said:

> "Nor is Collins' claim that he was unfairly pressed into giving the answers on which he was convicted borne out by the record. While he was reluctant to be pinned down to a specific day and date, March 11, 1953 or September 9, 1953, he was quite willing to swear to the signing at some time prior to April 1, 1953 and October 1, 1953, respectively."

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Reasons for Granting the Writ

First: The opinion of the Court of Appeals inaugurates a new rule in perjury cases that in principle, we respectfully submit, conflicts with decisions of other courts of appeals on the same matter and modifies, if it does not overrule one of its own decisions which adhered to the majority rule that whenever the subject-matter of alleged false testimony is in its nature susceptible of "direct" proof, circumstantial evidence is not enough to support conviction of perjury. *United States v. Otto*, 54 F. 2d 277. The court below said in part:

> "Whether the evidence is 'direct' in the sense in which the term is usually used should not be the criterion here. The test should be whether the evidence is of a quality to assure that a guilty verdict is solidly founded."

Applying this test the Court of Appeals finds the evidence against petitioner far stronger, more cogent and more convincing than the contrary oath of another, and that the testimony of the IBM type designer and the FBI expert, although in a sense circumstantial, is absolutely inconsistent with petitioner's innocence. The use of such evidence, the court feels, may be considered akin to the

use of documents signed by the witness under the rule of *United States v. Wood*, 14 Pet. 430, 440. The minutes themselves, signed by the petitioner, it is said, "contain the refutation of his testimony in the type in which they were written and the direct proof as to the date of its first existence."

If the rule thus announced and applied is to control in the future, then it would seem that the Court of Appeals for the Second Circuit has aligned itself with those state courts which hold that perjury may be proved by circumstantial evidence if it establishes guilt beyond a reasonable doubt,

> *State v. Storey*, 148 Minn. 398; 182 N. W. 613; 15 A.L.R. 629;
> *State v. Cerfoglio*, 46 Nev. 332; 205 P. 791, 27 A.L.R. 848;
> *People v. Doody*, 172 N.Y. 165; 64 N.E. 807,

and that in principle the court below has brought itself in conflict with other courts of appeals, notably of the 4th and 9th circuits,

> *Allen v. United States*, CCA 4, 194 F. 664,
> *Clayton v. United States*, CCA 4, 284 F. 537,
> *Radomsky v. United States*, USCA 9, 180 F. 2d 781.

Under any definition we have been able to find,[11] the testimony of the expert witnesses in the case at bar presented to the jury only circumstantial as distinguished from direct evidence of falsity of petitioner's oath. We respectfully submit the testimony of the IBM type designer was that of an expert and was not, as the trial judge charged, direct. He was not present at the labor union meetings recorded in the minutes; he did not see them typed; he testified to no knowledge of office procedure from the time petitioner turned his notes over to a stenographer to be typed; and he was, as the trial court correctly said (184a), "able to give the expert opinion that the minutes • • • were prepared on a typewriter using Prestige pica type design."

Had petitioner been charged with a criminal offense other than perjury it might be urged that such expert testimony because of possibly strong inferences to be drawn therefrom was as persuasive and compelling as that of a live witness to the actual events, an officer or member of the labor union, the secretary who typed the minutes, or any employee present when any of the necessary clerical work was performed, including persons who saw petitioner sign the document when it was ready. Any conclusion that

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[11] "The basic distinction between direct and circumstantial evidence is that in the former instance the witnesses testify directly of their own knowledge as to the main facts to be proved, while in the latter case proof is given of facts and circumstances from which the jury may infer other connected facts which reasonably follow, according to the common experience of mankind." 20 Am. Jur., Evidence, §270, p. 278; *Radomsky v. United States*, *supra*, 180 F. 2d 781, 783; "Evidence is often called direct evidence when, if it be true, it immediately establishes the fact to be proved by it; and indirect when it establishes immediately collateral facts from which the main fact may be inferred." Webster's New Int. Dictionary, 2d ed., Unabridged.

he actually signed them long after 1953 must be based upon inferences and expert opinions.

The Court of Appeals' opinion, p. 224, held that the use of testimony "in a sense circumstantial," may be considered "akin to the use of documents signed by the witness under the rule of *United States v. Wood*, 14 Pet. 430, 440." The trouble with this theory is that it was never submitted to the jury; the trial court expressly ruled (107a) that this is not a document case, [12] and thus barred as superfluous any argument by defense counsel on the subject (107a). Had he ruled otherwise, petitioner would have been put on notice to defend a "document case"; consequently, he presented only that portion of his defense sufficient to support the proposition that the government's proof lacked testimony of living witnesses essential to a non-document case of perjury. The court below, we respectfully submit, should not have affirmed the conviction upon a theory not submitted to the jury. [13]

Since our research fails to disclose any case involving the same precise factual situation, we have stressed con-

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[12] "The Court: You don't have to argue that. It is not a document case in the strict sense of the Wood case, it is not a strict document case, except the document is the minutes, and the rule as to the document does not apply at all" (107a).

[13] Actually this is not a document case and the trial court was correct (107a). A document case, as we understand it, is one in which writings of the defendant *intrinsically* refute the allegedly perjurious testimony. Where evidence *extrinsic* to the writing must be adduced and from such evidence an inference drawn, the test for a document case is not met. There must be, in effect, either an explicit or implicit written admission against interest shown either by the writing or, perhaps, photographical enlargements, or visible physical condition of the paper, to constitute a document case. *United States v. Wood*, 14 Pet. 430; *Barker v. United States*, 9 Cir., 198 F. 2d 932; *Spaeth v. United States*, 6 Cir., 218 F. 2d 361.

flicts in principle created by the decision of the court below and the new rule of evidence and quantum of proof in perjury cases which it will establish if not reversed. And this leads us respectfully to suggest that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

We therefore respectfully submit, for the reasons hereinassigned, that the writ should issue to review the first question raised in this petition.

Second: Although the second question presented may possibly be of greater importance to petitioner than to the profession, we raise the point to preserve it for review and to invite attention to claims of injustice suffered by petitioner when testifying as a witness before the grand jury, contentions which were ignored by the trial court in his jury instructions. The principle which we invoke, which the grand jury interrogator violated (53a to 56a), and which the District Judge overlooked in refusing appropriate defense requests to charge (175a, 176a, 199a, 200a), is correctly stated in a previous decision of the Circuit Court of Appeals for the Second Circuit in *United States v. Otto*, 54 F. 2d 277, 279:

> "We all know that this crime (perjury) is one of the most serious and that its effects are far-reaching, obstructive and destructive. We all know, too, that a person accused of this crime is guilty only if he has knowingly sworn falsely. A witness under oath need not at his peril testify to the truth considered as an absolute fact, if it ever can be, according to the deductions and conclusions of a jury, but as a matter of legal right is permitted, and as a matter of conscience is firmly bound, to testify to what he honestly knows the truth to be, however

> strongly appearances may point to the contrary. And so there has been recognized and applied in prosecutions for perjury the salutary rule, for the benefit of that vast army of honest witnesses who would otherwise stand in justified fear of over-zealous prosecutors, that one cannot be convicted of this crime without direct evidence of guilt."

Petitioner, we respectfully submit, was entitled to state his "belief" as to the dates involved, when giving his testimony before the grand jury. He did not have to be positive. [14]

As appears from our concise statement of the case, *supra*, and from the appendix (53a-56a), government counsel throughout his interrogation of petitioner repeatedly insisted that the witness at his peril testify to the truth considered as an absolute fact, and thus deprived him of the privilege of testifying to what he honestly believed the truth to be. That this led to intimidation of the witness appears (149a) from the interrogator's warning that, "perjury is telling an untruth under oath when you're sworn to tell the truth," despite the legislative definition of the offense, 18 U.S.C. §1621. [15]

It is our position that in at least two respects, counsel for the Government was manifestly unfair. [16]

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[14] 3 Wigmore on Evidence, §726, p. 58; 20 Am. Jur., Evidence, §768, p. 639.

[15] This, together with insistence upon positive answers, not only denied petitioner the right to state what he believed, it withheld from him that measure of fundamental fairness which a witness before a grand jury, without benefit of counsel, is entitled to expect from the representative of the government of the United States.

[16] This Court cannot review errors committed in the grand jury room: it may, however, consider the District Court's failure to give appropriate requests to charge (175a, 176a) the jury regarding defendant's legal rights as a grand jury witness.

(a) The grand jury was investigating violations of laws of the United States proscribing wiretapping, so-called, labor racketeering, and obstruction of justice, and its legitimate function was to ascertain whether there was sufficient evidence to indict for any offense of this nature occurring within the jurisdiction of the southern district of New York; its traditional and historic purpose would be to ascertain the truth. We respectfully submit that counsel for the Government, by questioning Mr. Collins in the manner adopted, by rejecting any statement that the witness "believed" certain facts to be true, was, for some reason best known to himself, seeking to lay the foundation for a charge of perjury. At any rate, he was apparently not interested in protecting the rights of a witness to testify to the best of his knowledge and belief, rather than at his peril to testify to the truth considered as an absolute fact, "if it ever can be," *United States v. Otto, supra.*

(b) There is absolutely no evidence that defendant had any knowledge of the matters to which the expert witnesses later testified at his trial (74a-100a). It is, we think, a valid inference that Government counsel possessed at least some, if not all, of the information later derived from the IBM typewriter and the style of type with which the minutes are said to have been written. In the first place, he did not interrogate the witness on dates of signature when Mr. Collins first testified on March 21 and 22, 1957 (43a-50a). Before recalling the witness on April 24, approximately 33 days later, counsel probably had access to the April 8 report of the witness Dahlgren; and this is a fair inference to be drawn from the line of questioning pursued on April 24, 1957 and thereafter.

The foreman of the grand jury testified (42a) he could not recall that defendant was ever told, while testifying on

April 25, that the grand jury had some evidence that the minutes had been retyped; he had no recollection that defendant was ever told about that matter. And the record, so far as we have examined it, fails to disclose any such demonstration of frankness on the part of the grand jury investigator.

We, therefore, respectfully submit that the trial Court erred in refusing defendant's requests to charge (175a-176a), that "no one had the right to compel Collins to be positive or withdraw his mental reservations" (176a),—that "Collins was entitled to testify before the grand jury that he was not positive" (176a)—and that "the definition of perjury given by the U. S. attorney before the grand jury is incorrect and should not be relied upon by them in determining the issues in this case" (175a).

7

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDMUND E. SHEPHERD,
Counsel for Petitioner.

GEORGE S. FITZGERALD,
HENRY G. SINGER,
With him on the Petition.

Dated, January 26, 1960.

APPENDIX A

Appendix A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 59—October Term, 1959.

(Argued October 13, 1959 Decided December 3, 1959.)

Docket No. 25695

UNITED STATES OF AMERICA,

Appellee,

—v.—

BENJAMIN FRANKLIN COLLINS,

Defendant-Appellant.

Before:

CLARK, *Chief Judge,*
MOORE, *Circuit Judge,* and SMITH, *District Judge.*

Appeal from the United States District Court for the Southern District of New York, John M. Cashin, *Judge.*

The defendant appeals from a conviction in the United States District Court for the Southern District of New York on verdict of a jury of two counts of perjury in violation of 18 U. S. C. 1621. The indictment contained 12 counts. Defendant was convicted on Counts 1 and 2, found not guilty on Counts 3, 6, 7, 8, 9, 10, 11 and 12; Counts 4 and 5 were dismissed. The convictions on Counts 1 and 2 are affirmed.

JEROME J. LONDIN, Executive Assistant United States Attorney, Southern District of New York, N. Y. (S. Hazard Gillespie, Jr., United States Attorney for the Southern District of New York, N. Y., David R. Hyde and Richard C. Casey, Asst. United States Attorneys, on the brief), *for appellee.*

HENRY G. SINGER, Brooklyn, N. Y. (Edmund E. Shepherd, Lansing, Michigan, on the brief), *for defendant-appellant.*

SMITH, *District Judge:*

This is an appeal from conviction on two counts of perjury on trial to the jury. The allegedly perjurious statements were made to a grand jury investigating possible violations of the laws of the United States penalizing wiretapping, labor racketeering, obstruction of justice and conspiracy. The grand jury was looking into acts of Teamsters Union Local 299 of Detroit which had occurred in New York and which related to a Congressional investigation in Detroit in the spring of 1953. The grand jury questioned Collins about the preparation of certain minutes of Local 299 and about checks from the local to Spindel, an alleged wire tapper, drawn by Collins at the direction of James Hoffa, Local 299's president. There being no mention of Spindel in the minutes, Collins was asked whether they had been changed. Collins swore they had not been. Collins was asked as to the dates that the minutes had been signed by him. The two statements on the basis of which the jury found Collins guilty were, (1) that minutes of the meeting of March 11, 1953 at Detroit had been signed by Collins as secretary-treasurer shortly after but before April 1, 1953, and (2) that minutes of a similar meeting

held at Detroit September 9, 1953 had likewise been signed by him on or before October 1, 1953.

The government produced at the perjury trial a witness who had been for twelve years a designer of type for I.B.M. who testified that in his expert opinion the minutes had been prepared on an I.B.M. machine with Prestige Pica Type, a type style invented by the witness and not available to salesmen until February 1955; and that there was not in existence prior to February 1955 any typewriter which could type the minutes except for two prototype machines at all times in possession of I.B.M. A document examiner of the F.B.I. testified to his opinion that the minutes in question had been typed on a machine, Government's Exhibit 15, obtained from Local 299's office. Records were introduced to show that this machine was purchased by Local 299 from I.B.M. in March 1956.

It is the claim of appellant that this evidence is insufficient for conviction because the falsity of neither statement is proven by the testimony of two witnesses or one witness and corroborating circumstances. The rule is sometimes so expressed. *Weiler* v. *United States*, 323 U. S. 606, "uncorroborated testimony of a single witness" not sufficient; *United States* v. *Otto*, 2 Cir., 54 F. 2d 277, "direct and positive evidence" necessary; *United States* v. *Neff*, 3 Cir., 212 F. 2d 297, 307, "strong, clear, convincing and direct." The rule has been strongly criticized. 7 Wigmore, Evidence (3d Ed. 1940) secs. 2040, 2041. Whether the evidence is "direct" in the sense in which the term is usually used should not be the criterion here. The test should be rather whether the evidence is of a quality to assure that a guilty verdict is solidly founded. The purpose of the rule was to prevent ill-founded retaliatory attack by perjury prosecution upon a witness on no more than the contrary oath of another. *Weiler* v. *United States*, *supra*. We have here evidence far stronger, more cogent

and more convincing than that. If the experts, supported by the exhibits are to be believed, it was an utter impossibility that Collins' testimony before the grand jury was true. The testimony, although in a sense circumstantial, is absolutely inconsistent with Collins' innocence (cf. *Allen* v. *United Sttaes*, 4 Cir., 194 F. 664, 667), and is more convincing than would be the recollection of one or two witnesses that he had signed the minutes at a certain date later than the date sworn to by him. The use of such evidence may be considered akin to the use of documents signed by the witness under the rule of *United States* v. *Wood*, 14 Pet. 430, 440.

> "The question is, when and how the rule is to be applied, that it may not, from a technical interpretation, or positive undeviating adherence to words, exclude all other testimony as strong and conclusive as that which the rule requires." *United States* v. *Wood*, *supra*, at 439.

Here the written proof, the minutes themselves, signed by Collins, contain the refutation of his testimony in the type in which they were written and the direct proof as to the date of its first existence. Cf. *United States* v. *Goldstein*, 2 Cir., 168 F. 2d 666, 668, 672; *Barker* v. *United States*, 9 Cir., 198 F. 2d 932. The quantum of proof is sufficient.

Collins' other contentions have even less merit. He attacks the court's finding that the false statements were material to the grand jury's investigation. This is without substance. Obviously inquiry as to the time of preparation and signing of the minutes of the local to determine whether there had been a substitution of pages dropping out mention of transactions with Spindel was material in an investigation by the grand jury to determine the rela-

tionship between the alleged wire tapper, payee of checks from the local, and the local. The standard is set forth in *Carroll* v. *United States*, 2 Cir., 16 F. 2d 951, 953, cert. den. 273 U. S. 763, as follows:

> "Its (the grand jury's) investigation and full duty is not performed unless and until every clue has been run down and all witnesses searched for and examined in every proper way to find if a crime has been committed, and to charge the proper person with the commission thereof. Its investigation proceeds step by step. A false statement by a witness in any of the steps, though not relevant in an essential sense to the ultimate issues pending before the grand jury, may be material, in that it tends to influence or impede the course of the investigation. This materiality has been recognized by the courts. (Citing cases.) The test of materiality in a grand jury's investigation is whether the false testimony has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation, and, if it does, an indictment for perjury may be predicated upon it."

And see *United States* v. *Alu*, 2 Cir., 246 F. 2d 29; *United States* v. *Weber*, 2 Cir., 197 F. 2d 237, cert. den. 344 U. S. 834; *United States* v. *Moran*, 2 Cir., 194 F. 2d 623, cert. den. 343 U. S. 965; *United States* v. *Hirsch*, 2 Cir., 136 F. 2d 976, cert. den. 320 U. S. 759; *United States* v. *Siegel*, 2 Cir., 263 F. 2d 530, cert. den. 359 U. S. 1012; *United States* v. *Goldstein*, *supra*.

The not guilty verdicts on the other counts, which the jury thought "repetitious" are not *res judicata* on these first two counts, nor is inconsistency of verdict on other counts material in considering the verdicts on these two counts. *United States* v. *Coplon*, 2 Cir., 185 F. 2d 629,

cert. den. 342 U. S. 920; *United States* v. *Dotterweich*, 320 U. S. 277, 279. Nor is Collins' claim that he was unfairly pressed into giving the answers on which he was convicted borne out by the record. While he was reluctant to be pinned down to a specific day and date, March 11, 1953 or September 9, 1953, he was quite willing to swear to the signing at some time prior to April 1, 1953 and October 1, 1953, respectively.

Judgment affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 658

BENJAMIN FRANKLIN COLLINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 21-26) is reported at 272 F. 2d 650.

JURISDICTION

The judgment of the court of appeals was entered December 3, 1959. A petition for rehearing was denied on December 31, 1959. The petition for a writ of certiorari was filed on January 26, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, on a charge of perjury in swearing that certain documents had been signed in 1953, proof by experts that the type design of the typewriter used to prepare the documents was not available until 1955 satisfied the quantum of proof required for perjury cases.

2. Whether petitioner was fairly treated before the grand jury at which he gave the testimony on which the perjury charge was based.

STATEMENT

In the United States District Court for the Southern District of New York, petitioner, secretary-treasurer of a local union, was convicted of perjury on two counts and sentenced to imprisonment for three years on each count, the sentences to run concurrently (R. 231-232).

The perjury charged was that petitioner testified under oath before a grand jury that he signed certain minutes of the local before April 1, 1953 (count 1; R. 5-6) and others before October 1, 1953 (count 2; R. 7-8). The minutes were dated March 11, and September 9, respectively (R. 37). On April 24, 1957, before the grand jury, petitioner testified that he signed them shortly after they were typed up a few days after the date thereof. While he would not specify the exact date of signing, he stated positively in each instance that the minutes were signed before April 1, 1953 and October 1, 1953, respectively (R. 50, 53-57). He reiterated this testimony at the ses-

sion of May 1, 1957, after he was given an opportunity to read over the minutes and asked whether anything had been changed (R. 59-71). He again repeated this testimony on May 8, 1957, after he had been told that the grand jury wanted nothing but the truth (R. 72-74).

To show the falsity of the petitioner's testimony, the government offered the testimony of an employee of the International Business Machines Corporation (Smith) who had designed the Prestige pica type for that company's electric typewriter. He testified that the minutes involved in this case were typed on a typewriter with Prestige pica type (R. 76-81); that he had not completed the design of that type until the latter part of 1954, and that the typewriters with such type were offered for sale in February 1955 (R. 74-76). An F.B.I. document examiner (Rogers) testified that the minutes were typed on an I.B.M. typewriter having serial No. 446239 (R. 96-97). A typewriter with that serial number had been purchased by the union in March 1956 (R. 94; see R. 185).

In submitting the case to the jury, the judge charged (R. 184-185):

> The witness Smith testified that he developed a certain design of type called Prestige pica. Because of his long experience in the field and his knowledge of the various styles of type in use, Smith was able to give the expert opinion that the minutes of September 9, 1953 and March 11, 1953 were prepared on a typewriter using the Prestige pica type design. Since he developed this style himself he could and did

> testify from his own knowledge that, except for two prototype typewriters, each of which was under the control at all times of the International Business Machines Company, there was not in existence prior to February, 1955, any typewriter which could have typed the minutes of September 9, 1953 and March 11, 1953.
>
> The evidence given by the witness Smith is the direct evidence of a living witness necessary to support a perjury conviction under the special rule of law applicable to perjury cases which I have explained to you.
>
> * * * * *
>
> The testimony of the witness Rogers and the exhibits introduced through that testimony are corroborative of the testimony of Smith to the effect that Local 299 of the Teamsters Union could not have had available a typewriter with Prestige pica type at the time the minutes dated September 9, 1953 and March 11, 1953 were purportedly prepared and signed.

The court of appeals affirmed the conviction, finding that there was sufficient evidence to support the conviction for perjury. It stated that it did not need to decide whether the evidence was "direct" since the true issue was whether the evidence was of a quality to assure that the guilty verdict was solidly founded; and that the testimony offered by the government in this case "although in a sense circumstantial" was "more convincing than would be the recollection of one or two witnesses that he [petitioner] had signed the minutes at a certain date later than the date sworn to by him" (Pet. 24).

ARGUMENT

1. Petitioner argues that the court of appeals has enunciated a new rule as to what constitutes "direct evidence" in a perjury case and that, in any event, the theory of the court of appeals was not submitted to the jury since the judge charged that the testimony of the I.B.M. designer was that of a "living witness" (Pet. 12-16). Actually, although the phraseology is different, the case was submitted to the jury and affirmed by the court of appeals on the same fundamental rationale, which has the support of early common law and later cases. The "direct testimony" of a witness within the special perjury rule does not require only eye-witness testimony, but means testimony which is direct in the sense that, in and of itself, it has a rationally direct and compelling tendency to establish the fact to be proved, even though some process of interpretation may be necessary.

One of the earliest statements of the quantitative rule in perjury was that given by Parker, C.J., in his charge to the jury in *Regina* v. *Muscot*, 10 Mod. 192 (1714), and this formulation does not even use the term "direct". The charge was as follows:

> There is this difference between a prosecution for perjury and a bare contest about property, that in the latter case the matter stands indifferent; and, therefore, a credible and probable witness shall turn the scale in favour of either party; but in the former, presumption is ever to be made in favour of innocence; and the oath of the party will have a regard paid to it until dis-

> proved. Therefore, to convict a man of perjury, a probable, a credible witness is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant; for else there is only oath against oath.

In *Regina* v. *Hook*, 27 L.J.M.C. (N.S.) 222, 31 L.T. (O.S.) 221 (1858), the English court accepted, as direct proof of the falsity of a policeman's testimony that he had not seen anyone leave a publican's house, evidence that the policeman had shortly before stated a number of times that he had seen such persons leave the house, plus the corroborating circumstance that people did in fact leave the house at the specified time. There was no "direct" evidence, in the sense petitioner uses "direct", to show that the policeman did see the people leave. The testimony adduced was "direct" because it logically and compellingly tended —directly and unequivocally—to establish the fact to be proved.[1]

The so-called "exception" to the quantum of proof requirement in perjury laid down by this Court in the early case of *United States* v. *Wood*, 14 Pet. 430—that testimony of a living witness is unnecessary when the falsity of the oath is proved by documentary evidence emanating from the defendant—

---

[1] See also *Berwick's Case*, Foster, *Crown Cases and Crown Law*, p. 10, 18 How. St. Trials 367 (1746), a treason case, where testimony that, after a rebel garrison had surrendered, the defendant appeared in the prison set aside for officers and gave his rank, was held to be, not a mere confession after the fact, but an act constituting direct evidence of treason. (See the subsequent comment thereon, Foster, *Crown Cases and Crown Law*, pp. 243-244.)

is really an application of the philosophy found in the early English cases that evidence which directly and compellingly tends to establish the fact to be proved is sufficiently direct to satisfy the rule for perjury cases. The court of appeals was therefore correct in saying that the evidence here could be considered as "akin to the use of documents signed by the witness" under the *Wood* holding (Pet. 24). And the district court was also correct in saying that the type of evidence offered here, based on the direct knowledge of the designer as to when the typewriter came into being, was the "direct" testimony of a witness as that term is used in the usual statement of the perjury rule.

There is no conflict of circuits on this issue. The cases cited by petitioner as involving a conflict in principle (Pet. 13) all involved situations in which the testimony offered did not have the direct probative force of the documents involved in *Wood* or the expert testimony here. Indeed, *Radomsky* v. *United States*, 180 F. 2d 781 (C.A. 9), cited by petitioner, draws the very distinction between circumstantial and direct evidence which we think is the correct interpretation of the perjury rule. The court there said (180 F. 2d at p. 783):

> Circumstantial evidence is that which establishes the fact to be proved only through inference based on human experience that a certain circumstance is usually present when another certain circumstance or set of circumstances is present. Direct evidence establishes the fact to be proved without the necessity for such inference. These are abstract definitions but an un-

derstanding of them is necessary in order that a proper appraisal of the evidence in a given case may be made. Of course, the distinction between circumstantial and positive evidence must be taken in a practical sense. Thus, if a witness had testified to seeing someone other than appellant mail the letter it would be direct evidence that appellant did not mail it notwithstanding the necessity of an inference based on experience that a letter deposited in the mail by one person cannot, before arriving at its destination, have been deposited in the mail by another person. The possibility of the letter's being mailed twice is so negligible that the evidence would be direct for all intents and purposes. * * *

2. The contention that petitioner was unfairly treated before the grand jury (Pet. 16-19) is completely refuted by the record. Far from attempting to pin petitioner down to a specific date for his actual signing of the minutes, government counsel, time and again, indicated that all he was trying to do was to make certain that the minutes were signed within some reasonable time after the date of the meeting allegedly reported—that they were not signed years later (R. 54-55, 56-57, 60-61, 63, 69-71, 73-74).[2]

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[2] See, *e.g.*, at R. 54:

"Q. So you did not sign these minutes of March 11, 1953—let's play safe—is it your sworn testimony that you did not sign these minutes of March 11, 1953 after April of 1953? A. Yes, sir."

R. 56:

"Q. Let me ask you, did you sign these minutes of September 9, 1953, within the last month, Mr. Collins? A. No, sir."

Petitioner was given every opportunity to tell the truth and was warned of his privilege against self-incrimination (R. 50, 62, 72). The reminder of the penalties for perjury was part of the attempt to assure petitioner that what the grand jury wanted was the truth (R. 72). Petitioner's decision to lie was not the result of misconduct or pressure by the government.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1960.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

(Figures in parentheses refer to pages of Petitioner's Appendix unless context clearly indicates otherwise)

The nature of the Government's opposition of review in this case suggests that an elaboration of Petitioner's position may be of assistance to the Court.

I.

To begin with, the Government completely ignores the effect of the decision by this Court in *Weiler v. United States*, 323 U. S. 606. Significantly, it is not even cited by the Government.

The reliance of the Government on the *United States v. Wood*, 14 Pet. 430 is surely misplaced, since the minutes prepared by persons other than the petitioner are not documents such as the "invoice books" and the "thirty-five original letters from the defendant" in the *Wood* case.

Government Counsel rely on the authority of English cases which, in our view, shed little light upon the problem. For example, Chief Justice Parker in the *Queen against Muscot*, 10 mod. 192 (1714), 88 Eng., reports 689, merely drew the long recognized distinction between a Prosecution for Perjury (or, for that matter any criminal case) and "a bare contest about property," and enunciated the rule, now applicable to all criminal prosecution that "presumption is ever to be made in favour of innocence".* The trouble in the case at bar is that the court below applied to perjury the identical test used in all criminal prosecutions, namely "whether the evidence is of a quality to assure that a guilty verdict is solidly founded"; thus, in effect, abrogating the rule peculiar to perjury prosecutions.

II.

It was improper for the court below to sustain the convictions on appeal by deciding against petitioner, a vital, factual issue which the trial judge refused to submit to the jury at the trial. The petitioner requested the trial judge to charge that "The Government has produced no direct evidence bearing on the issue of the falsity of the alleged perjured testimony" (174a). Instead the trial court charged: "The evidence given by the witness Smith is the direct evidence of a living witness necessary to support

---

* Moreover, these English decisions antedate the perjury Act, 1911, 1st and 2nd Geo. V, Ch. 6, Sect. 13, cited by this court in *Weiler v. U. S.*, *supra* at 610, note 4.

a perjury prosecution * * *" (186a-187a). An exception was taken to this portion of the charge (196a).

The court below in affirming the conviction, however, stated that whether the evidence is direct "should not be the criterion here" and "The testimony, although in a sense circumstantial, is absolutely inconsistent with Collins' innocence * * *" (Pet. 23-24).

Here, therefore, as in *Gruneuald v. United States*, 353 U. S. 391, the Court of Appeals has sustained a conviction on a theory of facts never submitted to, nor passed upon by the jury. Clearly, an appellate court may not under the *Gruneuald* rule, sustain a conviction on a ground not passed upon by the trier of the facts.

III.

We submit that the conduct of the Government prosecutor before the Grand Jury under the circumstances of this case calls for condemnation by this Court, in order that the rights of all individuals appearing before the Grand Jury be adequately safeguarded.

On April 24, 1957, the petitioner appeared before the Grand Jury and was asked the following questions by the Government prosecutor (53a-56a):

> "Q. Now, looking at the date of these minutes, March 11, 1953, can you tell this grand jury when you signed these minutes? (132) A. Well, I believe I signed them when they were finished.
>
> "Q. What do you mean you believe? Is there any doubt about that? If you have any doubt, tell us, and if you have no doubts, tell us that. A. I don't quite follow you, sir. When the girl finished them, more than likely I signed them right then.

"Q. Is it your recollection that you signed these minutes of March 11, 1953 at or about or shortly after March 11, 1953? A. Yes, sir; I believe so.

"Q. Is that your sworn testimony, Mr. Collins? A. I believe so, yes.

"Q. Not you believe. Is that your sworn testimony, that you signed these minutes of March 11, 1953 either March 11th, the 12th or the 13th of thereabouts? A. Shortly thereafter, yes, sir. I believe so.

"Q. Pardon? A. Yes, sir.

"Q. That's your sworn testimony? A. Yes, sir.

"Q. Are you sure you did not sign these minutes of March 11, 1953 in the year 1954? A. No, sir, I did not sign them in 1954.

(133) "Q. Are you sure of that? A. Why, certainly.

"Q. Are you sure you signed them before 1954? A. I believe that I signed them in the month of March 1953.

"Q. Are you positive that you did not sign these minutes of March 11, 1953 in the year of 1954 or later? A. Yes, sir; I am positive I did not sign them in 1954.

"Q. Are you positive that you signed these minutes of March 11, 1953 at the latest sometime at the end of the year of 1953? A. You are getting me mixed up now.

"Q. Don't get mixed up. I want you to think clearly. This is a serious business this grand jury is investigating. A. I would like to say I am almost positive I signed them shortly after March 11, 1953.

"Q. So at the very—when you say shortly after, what limit would you place on it to play safe? What do you say was the outside limit of March 11, 1953? A. I would say about two or three days after.

"Q. So you did not sign these minutes of March 11, 1953—let's play safe—is it your sworn testimony (134) that you did not sign these minutes of March 11, 1953 after April of 1953? A. Yes, sir.

"Q. Are you positive that these minutes of March 11, 1953 were signed at least sometime between March 11, 1953 and April 1st, 1953? A. Yes, sir.

"Q. That would be a fair leeway, is that right? A. I think so, yes, sir. I would say that would be a fair leeway.

"Q. That's a fair question? A. As far as I can see.

"Q. There is no trick to my question? A. No, sir.

"Q. It is your positive testimony that you signed these minutes of March 11, 1953 sometime between March 11, 1953—but at all events before April 1st, 1953? A. I believe you are right, sir.

"Q. Pardon? A. I believe you are right, sir.

"Q. You say I am right. Is that what your testimony is? A. Yes, sir.

• • • • •

"Q. Tell us once again, between September 9, 1953 and October 1, 1953, what did you do with respect to those minutes of September 9, 1953? A. I signed them in my own handwriting.

"Q. There is no question about it? A. I don't think there could be any question.

"Q. You say 'I don't think.' I don't want any mental reservations from you. Is that the fact, that you signed it sometime between September 9, 1953 and October 1st, 1953? A. I signed them."

The Government prosecutor, while interrogating the witness, had a report, made by a document examiner on April 8, 1957 (99a), which indicated that the minutes had been typed on a typewriter that was not available at the time the minutes, dated September 9, 1953 and March 11, 1953, were signed. A reading of the above testimony clearly indicates that the prosecution deliberately instigated and entrapped the witness into making his statements before this Grand Jury solely in order to obtain the *coup de grace*. See dis-

senting opinion by Judge Learned Hand in the *United States v. Remington*, 208 F. 2d 567, 571 (C. A. 2 1954).

"The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law." Thus spoke the Court in *McNabb v. United States*, 318 U. S. 332, 347. Those sentences have often been repeated, perhaps to the verge of rendering them hackneyed. But we think it is just as true today as in 1913 that "we need education in the obvious more than investigation of the obscure" (*Holmes, Speeches*, 99), and so we do not apologize for recurring to the fundamental truth articulated in McNabb.

We submit that before a Federal conviction, obtained by Federal ratification of "such di y business" is sustained, review by this Court should be had.

Accordingly, for these additional reasons, we believe that the present case calls for review by this Court.

Respectfully submitted,

EDMUND E. SHEPHERD,
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GEORGE S. FITZGERALD,
HENRY G. SINGER,
With him on the Petition.

Dated: February 26, 1960.

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PETITIONER'S PETITION FOR REHEARING

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PETITIONER'S PETITION FOR REHEARING

Petitioner, on the grounds following, petitions for rehearing of his petition for writ of certiorari:

1. Invoking judicial grace rather than exercising a privilege granted by Rule 58,[1] petitioner respectfully sug-

[1] We realize, of course, that this petition for rehearing may be rejected on the threshold if deemed to be outside the scope of Rule 58 (2) but counsel feels he would be remiss in his duty to his client if he did not tender it for filing. It is offered in good faith and not for purposes of delay; nor do we request withholding of the notification required by Rule 25 (2).

gests that a brief, concise extension of argument on the more important first question raised in his petition, as advanced in his reply brief, is worthy of the Court's consideration.

2. Over fifteen years ago, in *Weiler v. United States* (1945), 323 U. S. 606, the Government asked this Court to re-examine and abandon the rule of evidence and quantum of proof peculiar to prosecutions for perjury. The request was rejected upon adherence to an earlier decision, *Hammer v. United States*, 271 U. S. 620, 626. In the case at bar the Court of Appeals, in our view, affirmed conviction of perjury on the theory that proof of falsity of petitioner's grand jury testimony, the sworn opinions of expert witnesses, comes by way of analogy within the documentary exception to the 2-witness, or 1-witness-plus-corroboration rule in perjury cases, first recognized in *United States v. Wood*, 39 U. S. (14 Pet.) 430, 439-440.

The question of importance presented in our petition for certiorari, whether the Government's case was based on evidence deemed "direct" (as the Court of Appeals held) or "circumstantial" (as petitioner claims), was not answered in *Weiler*, nor in any other decision of this Court so far as we are aware. We therefore respectfully invite the Court to reconsider its denial of certiorari in order that it may entertain jurisdiction for the purpose of settling the question.

Moreover, we respectfully re-emphasize the point that the documentary exception theory was expressly ruled out of the case by the trial Court (107a) during defense presentation of petitioner's motion to dismiss the indictment at the close of the Government's case; thereafter, we respectfully suggest, petitioner's counsel was justified in relying upon the Court's forthright and emphatic ruling.

3. While the ground here asserted is not "confined to intervening circumstances of substantial or controlling effect," it is substantial and available to petitioner, "although not previously presented" in these precise terms (Rule 58-2).

Respectfully submitted,

EDMUND E. SHEPHERD,
Counsel for Petitioner.

CERTIFICATE

The foregoing peition for rehearing is presented in good faith and not for delay; and the petition is restricted to the grounds above specified.

EDMUND E. SHEPHERD,
Counsel for Petitioner.